No. 17-387

In the Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE, PETITIONER

v.

SHARLINE LUNDGREN AND RAY LUNDGREN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian tribe bars a state court's exercise of *in rem* jurisdiction in an action to quiet title to off-reservation land in which the tribe claims a property interest.

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OPINIONS BELOW

The opinion of the Supreme Court of Washington (Pet. App. 1a-38a) is reported at 187 Wash. 2d 857 and 389 P.3d 569. The order of the Washington Superior Court (Pet. App. 39a-40a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on February 16, 2017. A motion for reconsideration was denied on June 12, 2017 (Pet. App. 41a). The petition for a writ of certiorari was filed on September 11, 2017 (Monday), and was granted on December 8, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

INTRODUCTION

At the core of sovereignty is the authority to adjudicate disputes over land within the sovereign's territory. The State of Washington has exercised that authority by granting its courts *in rem* jurisdiction to hear quiet-title actions involving real property in Washington. Respondents Sharline and Ray Lundgren have invoked that jurisdiction to resolve a boundary dispute with their neighbor.

The Lundgrens' neighbor is the Upper Skagit Indian Tribe. The Tribe's land is not and never has been part of a reservation; the Tribe purchased it on the open market in 2013. The land has not been put into trust, and it is subject to Washington's jurisdiction just like any other land in the State. But the Tribe argues that its sovereign immunity bars this action. In making that argument, the Tribe seeks an expansion of immunity that would leave landowners like the Lundgrens without a meaningful remedy to protect their property rights.

If the Lundgrens' neighbor were a foreign country or another State that had purchased land in Washington, sovereign immunity would not apply here. As the United States acknowledges, it is settled law that a sovereign may not assert immunity in the courts of another sovereign to bar an action involving land that it owns within the forum sovereign's territory. The Tribe does not explain why it should enjoy a broader immunity. To the contrary, it argues that tribes should be treated like other sovereigns. That principle resolves this case.

This Court should affirm the decision below and hold that tribal sovereign immunity does not bar a state court's exercise of *in rem* jurisdiction in an action to quiet title to off-reservation land.

STATEMENT

1. The Lundgrens live in Bow, Washington, an unincorporated community approximately 60 miles north of Seattle. Their home is located on a parcel of land that they have owned since 1981 and that has belonged to their extended family since 1947. The northern edge of the property is marked by a barbed-wire fence, which has been maintained in its present location since at least 1947. Pet. App. 2a-3a.

The Upper Skagit Indian Tribe is a federally recognized Indian tribe in Washington. In the Treaty of Point Elliott in 1855, the Tribe's predecessors and other Indian tribes in the region agreed to "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them" in what is now northwestern Washington. Treaty of Point Elliott, art. 1, Jan. 22, 1855, 12 Stat. 927; see *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662 n.2 (1979). The United States set aside several tracts of land as reservations for the signatory tribes. Treaty of Point Elliott, art. 2, 12 Stat. 928. In 1981, the federal government established a separate reservation for the Tribe. 46 Fed. Reg. 46,681 (Sept. 21, 1981).

In an open-market transaction in 2013, the Tribe purchased a parcel of land immediately north of the Lundgrens' property. That parcel was not previously part of a reservation or held in trust status. Soon after purchasing the land, the Tribe conducted a survey establishing that the barbed-wire fence was about 20 to 40 feet north of the recorded boundary between the Tribe's and the Lundgrens' properties. Pet. App. 3a; J.A. 38. After clearcutting the area on its side of the fence, the

Tribe informed the Lundgrens that it intended to tear down the fence, clearcut the entire disputed strip of land, and install a new fence where the Tribe thought it belonged. J.A. 20.

2. In response, the Lundgrens brought this quiet-title action against the Tribe in the Washington Superior Court, claiming title to the land south of the fence by virtue of adverse possession and mutual acquiescence. Pet. App. 4a; J.A. 11-16. In their complaint, they asked the court to order that their "title to the Disputed Property be established and quieted in them, terminating any inconsistent claim" by the Tribe. J.A. 15.

The Lundgrens moved for summary judgment. Pet. App. 4a. They argued that the 10-year statute of limitations for an ejectment action had expired—and thus their title to the disputed land had vested—years before the Tribe purchased the adjoining property. See Wash. Rev. Code § 4.16.020. In support of their motion, they presented photographic evidence of the age of the fence. J.A. 23. They also submitted declarations establishing that their family had regularly harvested timber and cleared brush on their side of the fence; that they had maintained the fence; that the Tribe's predecessor in interest, Annabell Brown, had "never disputed [the Lundgrens'] ownership of the fence or the land south of the fence"; and that both Brown and the Lundgrens had "relied on the fence as the boundary marker." J.A. 18-19; see also J.A. 26-27. The Tribe moved to dismiss, arguing that it was not subject to state-court jurisdiction in the absence of a waiver of its sovereign immunity. Pet. App. 4a.

The trial court denied the motion to dismiss and granted summary judgment to the Lundgrens. Pet.

App. 5a. In its ruling on summary judgment, the court stated that "this is as clear * * * a case" of adverse possession "as I've had on the bench." *Ibid.*

3. The Washington Supreme Court affirmed. Pet. App. 1a-38a.

a. The Washington Supreme Court observed that a quiet-title action is a proceeding *in rem* that does not require a court to have personal jurisdiction over the defendant. Pet. App. 7a-8a. It held that "[a] court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity." *Id.* at 8a. In reaching that conclusion, the court relied on this Court's decision in *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), which permitted Yakima County to impose taxes on fee-patented reservation land that had been repurchased by the original tribal owner. Noting that this Court had "characteriz[ed] the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakima nation," the Washington Supreme Court explained that this Court had upheld "jurisdiction to tax on the basis of alienability of allotted lands, and not on the basis of jurisdiction over tribal owners." Pet. App. 8a-9a. Similarly, "[b]ecause courts exercise in rem jurisdiction over property subject to quiet title actions," the court concluded that "transferring the disputed property to a tribal sovereign does not bar the continued exercise of subject matter jurisdiction over the property," and the exercise of such jurisdiction "for the purposes of determining ownership does not offend the Tribe's sovereignty." *Id.* at 10a-11a (quoting *Smale* v. *Noretep*, 208 P.3d 1180, 1180 (Wash. Ct. App. 2009)).

The Washington Supreme Court further held that the Tribe was not a necessary and indispensable party under Washington Civil Rule 19, which parallels Federal Rule of Civil Procedure 19. Pet. App. 11a-18a. The court reasoned that the Tribe was not a necessary party because the Lundgrens' "title to the land was acquired long before the Tribe purchased the adjacent land." *Id.* at 15a. And it concluded that the Tribe was not an indispensable party because there was "no alternative judicial forum for the Lundgrens," so allowing the Tribe to "wield[] sovereign immunity as a sword" would "run[] counter to the equitable purposes underlying compulsory joinder." *Id.* at 17a-18a.

b. Justice Stephens dissented, joined by three other Justices. Pet. App. 19a-38a. She argued that "the Tribe is a necessary and indispensable party that cannot be joined" because of sovereign immunity, and that the court "should dismiss this case without reaching the merits of the Lundgrens' claims." *Id.* at 20a.

SUMMARY OF ARGUMENT

This Court has held that a State has *in rem* jurisdiction over actions involving title to land within its sovereign territory. That jurisdiction reflects the State's "interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property." *Shaffer* v. *Heitner*, 433 U.S. 186, 208 (1977) (footnote omitted).

This case involves a dispute over title to land in Washington. Although the Tribe argues that it has sovereignty over the land, it does not. The Tribe's sovereignty over the land was extinguished by treaty more than 150 years ago. The land has never been within any

reservation, nor has it ever been placed into federal trust status. Instead, the Tribe purchased the land in an open-market transaction shortly before this litigation began. Under *City of Sherrill* v. *Oneida Indian Nation of New York*, such a purchase does not allow a tribe to "unilaterally revive its ancient sovereignty." 544 U.S. 197, 203 (2005). The State of Washington, not the Tribe, is the sovereign with jurisdiction over the disputed land.

In attempting to demonstrate that it is nevertheless entitled to sovereign immunity, the Tribe asserts that sovereign immunity always bars an action against property in which a sovereign claims an interest. That is incorrect. Since at least the eighteenth century, it has been a settled rule of international law that a sovereign may not assert immunity in the courts of another sovereign to bar an action relating to immovable property that it owns within the forum sovereign's territory. That rule is equally well established as a limitation on the sovereign immunity of States. See *Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924). As the United States acknowledges, if the land at issue were claimed by a foreign nation or by another State, instead of by the Tribe, sovereign immunity would not bar this action.

The Tribe does not explain why tribes should enjoy an immunity rule broader than that of foreign nations and States. To the contrary, it expressly asserts that tribes should be treated the same as other sovereigns. And while the United States attempts to demonstrate that tribal immunity should extend more broadly than other forms of sovereign immunity, its efforts are unavailing. Because "common-law sovereign immunity principles" would not allow other sovereigns to assert immunity in these circumstances, the Tribe should not

be permitted to do so either. *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 (2017).

Allowing the Tribe to assert sovereign immunity in this case would require significantly expanding the doctrine of tribal sovereign immunity—essentially treating tribes as "super-sovereign[s]." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995). Such an expansion is not justified by this Court's precedents. It is also unnecessary to protect tribal interests; to the extent that tribes believe they require greater security of land title than is available to others, they can ask the United States to acquire land in trust for them. On the other hand, expanding immunity would impair the States' sovereign interest in adjudicating disputes over title to land within their territory and would frustrate the orderly adjudication of competing claims of ownership.

Finally, extending tribal sovereign immunity to these circumstances would harm landowners like the Lundgrens, who have "not chosen to deal with a tribe" but now find themselves with "no alternative way to obtain relief" for the Tribe's off-reservation activity. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 n.8 (2014). The Tribe has created a cloud on the Lundgrens' title to their land, and that cloud is a concrete injury for which Washington law provides a remedy. Accepting the Tribe's assertion of immunity would make that remedy unavailable while leaving the Lundgrens and others like them no practical alternative.

ARGUMENT

A. A State has *in rem* jurisdiction over actions involving land within its sovereign territory

As the Washington Supreme Court emphasized in the decision below, an action to quiet title is a proceeding *in rem*. Pet. App. 7a; see *Phillips* v. *Tompson*, 131 P. 461, 463 (Wash. 1913). Unlike an *in personam* action, which is based on the court's "authority over the defendant's person," an *in rem* action is "based on the court's power over property within its territory." *Shaffer* v. *Heitner*, 433 U.S. 186, 199 (1977). In an *in rem* action, the judgment "is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner." *Ibid.*

Under the traditional, territorially limited understanding of jurisdiction reflected in this Court's decision in *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), a state court generally could not exercise *in personam* jurisdiction over nonresident defendants. If a State were unable to exercise *in rem* jurisdiction, it would lack the ability to adjudicate title disputes involving a nonresident. See *Arndt* v. *Griggs*, 134 U.S. 316, 320 (1890). As this Court has recognized, however, "[t]he well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it." *Id.* at 321. To that end, a State may exercise *in rem* jurisdiction "over property within its limits" and may provide that "the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the

modes of establishing titles thereto." *Id.* at 320-321; accord *Phillips*, 131 P. at 464.

This Court has since departed from *Pennoyer*'s strict territorial understanding of personal jurisdiction. See *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). But under the modern approach, state courts retain the authority to exercise *in rem* jurisdiction in cases—such as quiet-title actions—"when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant." *Shaffer*, 433 U.S. at 207. Such jurisdiction, this Court has explained, remains necessary to protect "[t]he State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property." *Id.* at 208 (footnote omitted). Washington courts may therefore exercise *in rem* jurisdiction over an action involving title to real property located within Washington's territory, even if the defendant would not otherwise be subject to personal jurisdiction.

B. This case involves the ownership of land within the sovereign territory of the State of Washington

In evaluating whether the Washington courts have authority to adjudicate this case, the starting point in the analysis is that the land is located within Washington. The Tribe attempts to obscure that fact, referring (Pet. Br. 30) to the disputed property as its "sovereign land" and complaining (Pet. Br. 11) that this action threatens its "significant sovereign interests in ownership and control of [that] land." That is incorrect.

The Tribe has not exercised sovereignty over the land since 1855, when it agreed to "cede, relinquish, and convey" all of its "right, title, and interest in and to the lands" at issue here. Treaty of Point Elliott, art. 1, Jan. 22, 1855, 12 Stat. 927; see *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1080 (2016) (describing similar language as terminating tribal jurisdiction "in unequivocal terms") (quoting *Mattz* v. *Arnett*, 412 U.S. 481, 504 (1973)). The federal government established a reservation for the Tribe in 1981, but the land at issue here is not—and never has been—part of a reservation or otherwise held in trust. See 46 Fed. Reg. 46,681 (Sept. 21, 1981).

The Tribe's interest in the land is based solely on an open-market purchase less than two years before this litigation began. That purchase did not reestablish the Tribe's sovereignty over the land. In *City of Sherrill* v. *Oneida Indian Nation of New York*, this Court held that a tribe "cannot unilaterally revive its ancient sovereignty, in whole or in part" simply "through open-market purchases from current titleholders." 544 U.S. 197, 203 (2005). At issue in *City of Sherrill* were lands within the historic boundaries of the Oneida Reservation in New York State. *Id.* at 211. The Oneida Nation alleged that the lands had been unlawfully acquired from it many years before, and it reacquired them through open-market transactions. *Ibid.* But the Court squarely rejected the Oneida Nation's argument that it had thereby "unified fee and aboriginal title and [could] now assert sovereign dominion over the parcels." *Id.* at 213; accord *Anderson & Middleton Lumber Co.* v. *Quinault Indian Nation*, 929 P.2d 379, 388 (Wash. 1996) ("[T]hat the property is now owned in part by a federally recognized Indian tribal nation does not change" its subjection to

state jurisdiction "because the alienable fee status of the land continues * * * even if reacquired by an Indian Nation.").

That conclusion applies with even greater force here. Unlike the private lands purchased in *City of Sherrill*, the property at issue here was never part of a reservation, and there is no dispute that the Tribe's sovereignty over the disputed property was validly extinguished under federal law. It also is undisputed that sovereignty, jurisdiction, and regulatory authority over the property have been exercised by the State of Washington ever since that State was admitted to the Union "on an equal footing with the original States." Act of Feb. 22, 1889, § 8, ch. 180, 25 Stat. 679. *City of Sherrill* therefore bars any claim of tribal sovereignty over the property.

C. Sovereign immunity does not bar actions relating to immovable property held by one sovereign in the territory of another sovereign

In arguing that it is entitled to immunity, the Tribe begins with the premise that "[a]ll sovereigns * * * have interests in ownership and control of their land protected by sovereign immunity." Pet. Br. 27 (capitalization omitted). That premise is incorrect because it omits a critical qualification: A sovereign may not assert immunity to bar an action in the courts of another sovereign involving interests in land that it owns within the forum sovereign's territory. Sometimes referred to as the "immovable-property rule," that limitation has long been recognized in the context of foreign sovereign immunity and the sovereign immunity of the States. As the United States correctly acknowledges (Gov't Br. 25), "if [the Lundgrens'] suit had been brought against a for-

eign state or a sister state that had purchased real property in Washington, sovereign immunity would not bar the suit."

1. Foreign nations are not immune from actions relating to immovable property in the United States

International law has long recognized that when a foreign state owns real property outside its jurisdiction, it "must follow the same rules as everyone else." *City of New York* v. *Permanent Mission of India*, 446 F.3d 365, 374 (2d Cir. 2006), aff'd, 551 U.S. 193 (2007); accord Restatement (Third) of Foreign Relations Law of the United States § 455(1)(c) (1987). Since at least the eighteenth century, it has been "established that property which a prince has purchased for himself in the dominions of another * * * shall be treated just like the property of private individuals and shall be subject in equal degree to burdens and taxes." Cornelius van Bynkershoek, *De Foro Legatorum* 22 (Gordon J. Laing trans. 1946) (1744).

The rationale for the traditional limitation on the scope of foreign sovereign immunity is the same as that underlying *in rem* jurisdiction more generally: Because "[t]he well-being of every community requires that the title to real estate therein shall be secure," a state may demand that "the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto." *Arndt*, 134 U.S. at 320-321. As then-Judge Scalia explained, it is "self-evident" that "[a] territorial sovereign has a primeval

interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985). The authority to protect that "primeval interest" resides "in the nature of sovereignty," which demands that "[e]very government [have] the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries." *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 12 (1823); see Charles Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 Am. J. Int'l L. 566, 567 (1928) ("[R]ights to real property are a matter so intimately connected with the very independence of the state that none other than the local courts could be permitted to pass upon them."); 1 Francis Wharton, *Conflict of Laws* 636 (3d ed. 1905) ("A sovereignty cannot safely permit the title to its land to be determined by a foreign power.").

This Court first recognized the unavailability of sovereign immunity in immovable-property cases in *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, the Court relied on van Bynkershoek in observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting the property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *Id.* at 145. That observation was consistent with a uniform body of international-law commentary before and since. See, *e.g.*, 3 Emer de Vattel, *The Law of Nations* 139 (Charles G. Fenwick trans. 1916) (1758) ("[S]everal sovereigns have fiefs and other possessions in the territory of another prince; in such cases they hold

them after the manner of private individuals."); accord H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 244 (1951) ("There is uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property."); 2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 n.33 (2d ed. 1945) ("All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals, whether as defendants or as plaintiffs.") (internal quotation marks omitted); Note, *Execution of Judgments Against the Property of Foreign States*, 44 Harv. L. Rev. 963, 965 (1931) (collecting cases).

Congress also has recognized that sovereign immunity does not extend to cases involving real property held by one sovereign in the territory of another. In the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891, Congress expressly provided that immunity does not extend to cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). As this Court has explained, that provision did not represent a change in the law but rather was intended "to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice." *Permanent Mission of India* v. *City of New York*, 551 U.S. 193, 200 (2007) (quoting *Asociacion de Reclamantes*, 735 F.2d at 1521); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976); Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965).

2. States are not immune from actions relating to immovable property in other States

It is equally well settled that a State's sovereign immunity does not bar actions involving title to land held by the State in another State. This Court established that principle in *Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924). In that case, the State of Georgia had purchased land in Chattanooga, Tennessee, and when the city sought to condemn part of the land for use as a street, Georgia asserted that its sovereign immunity barred the city's action. *Id.* at 478-479. In language echoing that of van Bynkershoek, this Court rejected that assertion, explaining that "[l]and acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership." *Id.* at 480. The Court emphasized that because "[t]he sovereignty of Georgia was not extended into Tennessee," Georgia's "property there is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee." *Id.* at 481-482.

State courts have applied the same principle in rejecting other States' claims of immunity from actions involving land within the forum State. See, *e.g.*, *People* v. *Streeper*, 145 N.E.2d 625, 629 (Ill. 1957) (holding that a State or its municipality owning property in Illinois "occupies the same position here as a private entity"); *State* v. *City of Hudson*, 42 N.W.2d 546, 548 (Minn. 1950) ("[A] state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. * * * To all intents and purposes, ownership by a state of property located in another state is the same as that of a private

corporation."); cf. *Burbank* v. *Fay*, 65 N.Y. 57, 62 (1875) ("When one State holds lands within the limits of another State, it acquires its estate subject to all the incidents of ordinary ownership."). A contrary rule, courts have explained, would have the anomalous result of allowing a State to create "a separate island of sovereignty" by purchasing land in another State. *Streeper*, 145 N.E.2d at 630.

3. The Tribe errs in relying on cases involving land held by a sovereign within its own territory

The Tribe cites various cases for the proposition that sovereign immunity bars actions involving property held by a sovereign. Those cases have no application here. To the extent that they involve land rather than other forms of property, they involve land held by a sovereign within its own territory, rather than land held in the territory of another sovereign.

For example, the Tribe relies heavily (Pet. Br. 28-31) on *Idaho* v. *Coeur d'Alene Tribe of Idaho*, in which this Court held that the Eleventh Amendment barred an action against Idaho officials seeking "the functional equivalent" of quieting title to the submerged lands of Lake Coeur d'Alene in the Coeur d'Alene Tribe, notwithstanding the State of Idaho's claim to those lands. 521 U.S. 261, 282 (1997). Lake Coeur d'Alene, of course, is located within the State of Idaho, a fact that this Court emphasized when it explained that the requested relief "would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory." *Ibid.* Likewise, state courts have held that a State enjoys sov-

ereign immunity in an action challenging its title to land within the State. See, *e.g.*, *State* v. *Superior Court*, 94 P.2d 505 (Wash. 1939). Those cases have no bearing on the availability of immunity in actions involving land held by a State within another State.

Similarly inapposite are cases involving land held by the United States within the United States. Given the federal government's supremacy over all other sovereigns within its borders, see U.S. Const. art. VI, cl. 2, it is not surprising that the United States may assert sovereign immunity in cases involving land in which it claims an interest, even if those cases are brought by States. See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273 (1983); *United States* v. *Alabama*, 313 U.S. 274 (1941); *Minnesota* v. *United States*, 305 U.S. 382 (1939). Those cases do not suggest that the United States would be immune from suit in the courts of another country in which it owned land. To the contrary, the consistent position of the United States has been that it would not be immune in those circumstances. See U.N. GAOR, 59th Sess., 6th Comm., 13th mtg. at 10, U.N. Doc. A/C.6/59/SR.13 (Oct. 25, 2004) (statement of Eric Rosand, Deputy Legal Adviser, U.S. Mission to the U.N.) (stating the position of the United States that the unavailability of immunity "with respect to rights or interests in real property within [a] foreign State" is "widely recognized and [has] worked well").

The Tribe also cites interpleader and other *in rem* actions involving personal property. Pet. Br. 34-35; see, *e.g.*, *Republic of Philippines* v. *Pimentel*, 553 U.S. 851 (2008) (foreign sovereign immunity barred interpleader action involving claims to money allegedly stolen from the Republic of the Philippines); *Cory* v. *White*, 457 U.S.

85 (1982) (Eleventh Amendment barred interpleader action against state officials seeking to tax an estate); *Missouri* v. *Fiske*, 290 U.S. 18 (1933) (Eleventh Amendment barred action seeking to enjoin State from imposing inheritance taxes on securities). It also invokes bankruptcy and admiralty cases. Pet. Br. 22-24; see, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30 (1992) (Bankruptcy Code does not waive the sovereign immunity of the United States from an action seeking monetary recovery); *The Siren*, 74 U.S. (7 Wall.) 152 (1869) (sovereign immunity bars an *in rem* admiralty proceeding against a vessel in which the United States claims an interest).

None of those personal-property cases is relevant here. Because of a territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain," the law has distinguished between cases involving real property and cases involving personal property. *Asociacion de Reclamantes*, 735 F.2d at 1521. As the Washington Supreme Court emphasized, this case involves only "in rem jurisdiction to settle disputes over real property." Pet. App. 7a. All of the cases cited by the court in its discussion of *in rem* jurisdiction involved disputes over real property. *Id.* at 7a-11a. Indeed, the Washington Supreme Court could not have established a rule to govern bankruptcy or admiralty cases because Washington courts lack jurisdiction in such cases. See 28 U.S.C. 1333, 1334(a). Instead, this case is governed by the rule—acknowledged by the United States (Gov't Br. 25)—that a sovereign may not assert immunity to bar an action involving title to land that it holds within the territory of a different sovereign.

D. The unavailability of sovereign immunity in cases involving immovable property applies to Indian tribes as it does to other sovereigns

This Court has observed that Indian tribes "possess[] the common-law immunity from suit traditionally enjoyed by sovereign powers"—not a different, broader immunity. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). The Court has therefore held that the contours of other sovereigns' immunity are "instructive" in defining the scope of tribal sovereign immunity. *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001) (quoting *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 759 (1998)). And it has declined to "extend[]" tribal sovereign immunity "beyond what common-law sovereign immunity principles would recognize." *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 (2017).

The Tribe and most of its *amici* do not argue that tribal sovereign immunity is broader than the immunity of other sovereigns. Thus, the Tribe concedes (Pet. Br. 29-30) that the reasoning of this Court's decisions on the immunity of States "is equally applicable to tribal sovereign immunity," and that "[t]here is no principled basis to distinguish between the two immunities with respect to sovereign interests in land." Accord *Amici Curiae* Cayuga Nation, et al. Br. 18-19 (rejecting the suggestion "that Indian Tribes should be treated *differently* from other sovereigns" and urging the Court not "to create an Indian-only exception from bedrock immunity principles"); *Amici Curiae* National Congress of American Indians, et al. Br. 6 ("[T]he scope of tribal sovereign immunity is coextensive with the scope of federal and state immunity.").

That principle resolves this case. As explained above, a foreign nation or another State would not enjoy sovereign immunity in these circumstances. If the Tribe is treated like other sovereigns, it does not enjoy immunity either.

The United States, however, takes a contrary position. First, it suggests (Gov't Br. 25) that this Court should not consider foreign and state sovereign immunity at all. It then contends (*ibid.*) that the unavailability of foreign and state sovereign immunity from claims involving immovable property held in a different forum reflects "a special exception or special principles of sovereign immunity" that do not apply to tribes. In its view (Gov't Br. 29), the "contexts" of foreign and state immunity "differ significantly from tribal sovereign immunity." The United States advances several arguments for that view, but none is persuasive.

1. The United States asserts (Gov't Br. 25) that "neither the Washington Supreme Court nor respondents in their brief in opposition urged an exception to tribal sovereign immunity by reference to * * * an immovable-property exception for foreign or sister states." It therefore suggests (*ibid.*)—but does not say explicitly—that the Court might choose not "to consider that argument." The suggestion lacks merit.

The Washington Supreme Court necessarily considered the territorial limitations on sovereignty when it emphasized that state courts have "in rem jurisdiction to settle disputes over real property." Pet. App. 7a. Such jurisdiction rests on an understanding that a State's "jurisdiction to control the ownership and disposition of real property within its territory is a core state prerogative," which is the basis for the limitation on immunity in cases

involving real property. Br. in Opp. 6. The point was made even more explicitly in the principal case taking the Washington Supreme Court's side of the conflict in the lower courts, a case discussed in both the petition (Pet. 7) and the brief in opposition (Br. in Opp. 7). See *Cass Cty. Joint Water Res. Dist.* v. *1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 694 (N.D. 2002) (discussing *City of Chattanooga*).

In any event, the question presented as stated in the petition (Pet. i) is whether "a court's exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity." And the brief in opposition noted (Br. in Opp. i) that the question arises in the context of a "quiet title case concerning non-reservation land, where no sovereign interest existed." The question whether other sovereigns could assert immunity in similar circumstances is a "predicate to an intelligent resolution of the question presented" and is therefore fairly included within it. *United States* v. *Grubbs*, 547 U.S. 90, 94 n.1 (2006) (quoting *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996)); accord *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 579 n.4 (2008) (question was "fairly included" because the "question presented cannot genuinely be answered without addressing the subsidiary question"); see Sup. Ct. R. 14.1(a).

Indeed, the Tribe's principal argument is that other sovereigns enjoy immunity in these circumstances, and thus tribes should as well. The Lundgrens should be permitted to respond to that argument by showing that other sovereigns do not enjoy immunity in these circumstances. Even the United States begins its argument (Gov't Br. 12) with a discussion that appears under the heading "Sovereign Immunity Bars Suits Against The

Sovereign's Property," necessarily inviting the Court to consider whether or not that broad proposition is true. When "no sovereign interest exist[s]" on the part of the sovereign claiming immunity, it is not. Br. in Opp. i.

2. The United States contends (Gov't Br. 29) that foreign sovereign immunity differs from tribal sovereign immunity because "[f]oreign sovereign immunity is not a judge-made doctrine" but instead has been "determin[ed]" by the Executive Branch and Congress. In fact, "[a]s with tribal immunity, foreign sovereign immunity began as a judicial doctrine." *Kiowa*, 523 U.S. at 759. It was the federal courts, not the other Branches, that "extend[ed] virtually absolute immunity to foreign sovereigns" for more than 150 years. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In *Kiowa*, this Court emphasized that changes to the traditional "judicial doctrine" of foreign sovereign immunity had come from the other Branches, and it concluded that any analogous changes to tribal sovereign immunity should come from those Branches as well. 523 U.S. at 759. By the logic of *Kiowa*, any changes to the traditional immovable-property rule should come from Congress, not this Court.

Noting that the FSIA contains an exception for commercial activity and that "Indian tribes remain immune from suit based on commercial activities," the United States suggests (Gov't Br. 29) that "[t]he same is true with respect to the FSIA's immovable-property exception." But the commercial-activity exception to foreign sovereign immunity is a modern doctrine that was not recognized until 1952, when the United States adopted a "restrictive" theory that extends immunity only to the public acts of a state, and not to its private acts. Letter

from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976). As the State Department recognized in announcing the change, sovereign immunity had never extended to claims based on immovable property: Despite the differences between the "classical or absolute theory" and the "newer or restrictive theory," "[t]here is agreement by proponents of *both* theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property exempted)." *Alfred Dunhill*, 425 U.S. at 711 (emphasis added). The history of the commercial-activity exception does not support extending to tribes an immunity that no sovereign has ever enjoyed.

3. As to the sovereign immunity of States, the United States argues (Gov't Br. 30) that the immovable-property rule reflects the States' "surrender [of] their immunity as part of the plan of the Convention," a plan to which tribes were not parties. It also observes (Gov't Br. 28) that, in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court held that the Constitution does not require one State to afford another State immunity from suit in its own courts, and it suggests that *Hall* is the basis for the rule that "a sister State * * * would not be entitled to immunity from a quiet-title action." That is incorrect. The Court in *City of Chattanooga* did not rely on *Hall*, which was not decided until 55 years later. Rather, the Court in *City of Chattanooga* held that immunity simply does extend to actions involving "[l]and acquired by one state in another state." 264 U.S. at 480. As the Court explained, "Georgia can claim no sovereign immunity or

privilege" with respect to land it acquired in Tennessee. *Id.* at 479-480. The decision does not reflect a "surrender" of sovereign immunity that would otherwise exist; it reflects the complete absence of immunity to begin with.

4. The United States relies (Gov't Br. 30-31) on what it describes as an "established rule" that this Court may not "fashion exceptions to tribal sovereign immunity" and that such exceptions may be recognized only by Congress. That theory echoes the Tribe's suggestion (Pet. Br. 1) that there are "two, and only two, exceptions" to tribal sovereign immunity: "waiver of the immunity by the tribe and abrogation of the immunity by Congress." Those arguments beg the question by assuming that sovereign immunity would apply to this case in the absence of an "exception." In fact, sovereign immunity has never been applied to protect a sovereign from actions in another sovereign's courts that involve land held in the territory of the forum sovereign.

This Court has repeatedly recognized limits to tribal sovereign immunity even when those limits are not reflected in statutes passed by Congress. For example, even though Congress has never addressed the issue, the Court has held that States may seize tribally owned contraband—such as untaxed cigarettes—moving in off-reservation commerce without violating tribal sovereign immunity. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-162 (1980). Similarly, the Court has recognized that when a tribe sues a non-Indian, the defendant "may assert a counterclaim arising out of the same transaction or oc-

currence that is the subject of the principal suit as a set-off or recoupment." *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 891 (1986). Congress has never enacted such an exception to tribal sovereign immunity; it is a purely "judge-made doctrine." Gov't Br. 29.

Most recently, the Court held last Term that tribal sovereign immunity does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment, even though Congress has never legislated on that issue. *Lewis*, 137 S. Ct. at 1290-1292. Rather than ignoring the rules of immunity applicable to other sovereigns and leaving the matter to Congress, the Court evaluated "common-law sovereign immunity principles," applied them to tribes, and concluded that immunity did not exist in that context. *Id.* at 1292. That holding did not create an "exception" to tribal sovereign immunity; instead, the Court recognized that "immunity is simply not in play." *Id.* at 1291. The Court should reach the same conclusion here.

E. This Court should not expand tribal sovereign immunity

This Court has never held that tribal sovereign immunity bars an *in rem* action involving off-reservation land in which a tribe claims a property interest. Applying sovereign immunity to this case would require a significant expansion of the doctrine of tribal sovereign immunity not only beyond the immunity afforded to other sovereigns but also beyond what this Court has previously recognized. Such an expansion is unsupported by precedent; it is unnecessary to protect tribal inter-

ests; and it would impair the interests of States and of private landowners.

1. This Court's precedents do not support expanding immunity

This Court's precedents suggest no reason why Indian tribes, alone among all sovereigns, should be able to immunize real property located outside their sovereign domain from the *in rem* jurisdiction of the sovereign in whose territory the property is located. There is no justification for extending such "super-sovereign" immunity to tribes. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995); cf. *Rice* v. *Rehner*, 463 U.S. 713, 734 (1983) (tribal members are not "super citizens").

a. The limited nature of tribal sovereignty suggests that to the extent tribal sovereign immunity differs from that of other sovereigns, it should be narrower, not broader. Unlike foreign and state sovereignty, tribal sovereignty has been significantly divested. Tribes are "domestic dependent nations" that are "completely under the sovereignty and dominion of the United States." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); see 25 U.S.C. 71 (prohibiting the future recognition of any Indian tribe as an "independent nation, tribe, or power with whom the United States may contract by treaty"); *United States* v. *Lara*, 541 U.S. 193, 219 (2004) (Thomas, J. concurring in the judgment) ("Although the tribes never fit comfortably within the category of foreign nations, [25 U.S.C. 71] tends to show that the political branches no longer considered the tribes to be anything like foreign nations."). Whereas "[t]he Constitution specifically recognizes the States as sovereign enti-

ties," tribes were not parties to the Convention, and the Constitution does not guarantee their reserved sovereignty. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.15 (1996). To the contrary, the "incorporation [of tribes] within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); see also *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425-426 (1989) (plurality opinion) ("A tribe's inherent sovereignty * * * is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations.'") (quoting *Wheeler*, 435 U.S. at 326).

The Court has observed that "[t]he sovereign authority of Indian tribes is limited in ways state and federal authority is not." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 340 (2008). The "semi-independent position" tribes have is "not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973) (quoting *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886)). Even with respect to internal affairs, tribal sovereignty has been divested to a significant degree. For example, "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank*, 554 U.S. at 328. They cannot exercise regulatory authority over nonmember activity occurring within their territory, except when the nonmembers have entered into a consen-

sual relationship with the tribe or when their activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 566 (1981). "These exceptions are limited ones, and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks and citations omitted).

Accordingly, "because of the peculiar 'quasi-sovereign' status of the Indian tribes, [their] immunity is not congruent with that which the Federal Government, or the States, enjoy." *Three Affiliated Tribes*, 476 U.S. at 890. Granting tribes an immunity that is far broader than the immunity of foreign nations or States cannot be reconciled with the limited nature of the sovereignty that tribes retain.

b. The concerns this Court has expressed with the application of tribal sovereign immunity also counsel against its expansion. That is especially so in the context of *in rem* actions involving fee land, to which common-law sovereign immunity has never applied. When the Court has held that its precedent required application of sovereign immunity, it has chosen to defer to Congress' decision not to narrow the scope of that doctrine. See *Kiowa*, 523 U.S. at 759 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests."). In this context, where the Court has never held tribal sovereign immunity applicable, it should defer to Congress's decision not to expand its scope.

The Court has also recognized that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine"

of tribal sovereign immunity. *Kiowa*, 523 U.S. at 758. As the Court has explained, the doctrine already "extends beyond what is needed to safeguard tribal self-governance"; it is "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities"; and it "can harm those who are unaware that they are dealing with a tribe * * * or who have no choice in the matter, as in the case of tort victims." *Id.* at 757-758. The Court expressed similar concerns in *Michigan* v. *Bay Mills Indian Community*, when it reaffirmed *Kiowa* but acknowledged that it had not considered "whether the situation would be different" in the case of a "plaintiff who has not chosen to deal with a tribe [and] has no alternative way to obtain relief for off-reservation commercial conduct." 134 S. Ct. 2024, 2036 n.8 (2014). This case presents no occasion to revisit those decisions because common-law immunity has never applied in these circumstances. But the concerns identified in *Kiowa* and *Bay Mills*, and the Court's deference to Congress, are strong reasons not to expand tribal immunity beyond the scope of the immunity that has been recognized for other sovereigns.

2. Tribal interests do not require expanding immunity

The Tribe observes (Pet. Br. 26) that sovereign immunity protects a sovereign's dignity, financial resources, and self-government. Extending immunity to bar *in rem* actions against tribally owned fee land is unnecessary to advance those interests, which can be better promoted by the federal trust-acquisition process.

a. Actions involving tribally owned fee land do not impair a tribe's sovereign dignity. In the context of

state immunity, the Court has observed that "the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts." *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002). But any sovereign, when acquiring land outside of its territory, "may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145. Because "property ownership is not an inherently sovereign function," an *in rem* action involving that land is not an affront to the sovereign's dignity. *Permanent Mission of India*, 551 U.S. at 199.

Nor does an *in rem* action involving fee land "threaten the financial integrity" of a tribe. *Alden* v. *Maine*, 527 U.S. 706, 750 (1999); see *South Carolina State Ports Auth.*, 535 U.S. at 765 ("[S]overeign immunity serves the important function of shielding state treasuries."). In an *in rem* action, the judgment "is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner." *Shaffer*, 433 U.S. at 199.

Actions involving fee lands owned by tribes also do not threaten tribal autonomy or self-governance. In *Kiowa*, this Court observed that "the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States." 523 U.S. at 758; see, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (noting that the application of state law might sometimes "infringe[] on the right of reservation Indians to make their own laws and be ruled by them") (quoting *McClanahan*, 411 U.S. at 172). But the application of

nondiscriminatory rules of state property law to the off-reservation fee holdings of a tribe does not implicate those considerations. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973) ("Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). In *Plains Commerce Bank*, the Court explained that tribal regulation of the sale of non-Indian fee land located within reservation boundaries cannot "be justified by the tribe's interests in protecting internal relations and self-government." 554 U.S. at 336. That is "because non-Indian fee parcels have ceased to *be* tribal land." *Ibid.* And the Court has also concluded that when a tribe reacquires land in fee—even within historic reservation boundaries—that is insufficient to reestablish sovereign control. *City of Sherrill*, 544 U.S. at 203. An *in rem* action against land acquired on the open market cannot threaten tribal autonomy and self-governance because a "tribe's sovereign interests are now confined to managing tribal land," which fee land is not. *Plains Commerce Bank*, 554 U.S. at 334.

Similarly, this Court has upheld *in rem* actions against tribally owned property, emphasizing that States may "of course" enforce their tax laws "by seizing unstamped cigarettes off the reservation" that had been purchased by tribally owned retailers and were on their way to reservation outlets. *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi*, 498 U.S. at 514. As the Court has explained, "[b]y seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." *Confederated Tribes of the Col-*

ville Indian Reservation, 447 U.S. at 162; accord *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 270 (1992) (upholding state *in rem* taxation of "reservation land patented in fee").

b. To the extent that tribal property interests are deemed to require additional protection, Congress and the Executive Branch are able to provide it. Under 25 U.S.C. 5108, the Secretary of the Interior may "acquire * * * any interest in lands * * * for the purpose of providing land for Indians." When the Secretary exercises that authority, he takes title to lands "in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Ibid.* The statute provides that land that has been taken into trust "shall be exempt from State and local taxation." *Ibid.* Land held in trust for Indians is "Indian country" for purposes of federal statutes and regulations. *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 529-531 (1998). And by regulation, the Secretary has declared trust lands to be exempt from state and local property laws. 25 C.F.R. 1.4; see also *De Coteau* v. *District Cty. Court*, 420 U.S. 425, 428 (1975).

Significantly, when land is held in trust for a tribe, the sovereign immunity of the United States bars an action challenging the government's title. Although the Quiet Title Act, 28 U.S.C. 2409a, waives sovereign immunity in order to permit the United States to be sued "to adjudicate a disputed title to real property in which the United States claims an interest," it "does not apply to trust or restricted Indian lands," 28 U.S.C. 2409a(a). The statute thereby "retain[s] the United States' immunity from suit by third parties challenging the United

States' title to land held in trust for Indians." *United States* v. *Mottaz*, 476 U.S. 834, 842 (1986).

While the trust-acquisition process protects tribal interests, it also offers some protection to competing state and private interests. As this Court has observed, the regulations implementing 25 U.S.C. 5108 "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *City of Sherrill*, 544 U.S. at 220-221. For example, before taking land into trust, the Secretary must notify "the state and local governments having regulatory jurisdiction over the land to be acquired" and give them an opportunity to comment. 25 C.F.R. 151.11(d). He must also review "title evidence" and identify "any liens, encumbrances, or infirmities" in the tribe's title to the property. 25 C.F.R. 151.13(b). Unlike the "unilateral" shift in sovereign authority sought by the Tribe, that process "takes account of the interests of others with stakes in the area's governance and well-being." *City of Sherrill*, 544 U.S. at 219. The trust-acquisition process thus provides "the proper avenue" for protecting tribal property interests without expanding sovereign immunity. *Id.* at 221; see *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (trust-acquisition process would be "render[ed] partially superfluous" if tribes could "oust" state jurisdiction over land simply by buying it).

3. Expanding immunity would impair important state interests

It is "everywhere recognized," this Court has observed, "that the disposition of immovable property, whether by deed, descent, or any other mode, is exclu-

sively subject to the government within whose jurisdiction the property is situated." *United States* v. *Fox*, 94 U.S. 315, 320 (1877). "The power of the state in this respect follows from her sovereignty within her limits." *Ibid.* Expanding tribal sovereign immunity to bar *in rem* actions involving immovable property would undermine that sovereign interest of the State.

The impairment of state interests would not be merely abstract or theoretical. The Washington Legislature has provided that "[a]ny person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court * * * and may have judgment in such action quieting or removing a cloud from plaintiff's title." Wash. Rev. Code § 7.28.010; see Wash. Const. art. IV, § 6 ("The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property."). The statute reflects the State's practical concern that "[t]itles to real estate * * * not be subjected to continuous clouds." *Phillips*, 131 P. at 463. If tribes were not subject to quiet-title actions with respect to fee lands they purchase on the open market, "[t]he State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property" would be frustrated. *Shaffer*, 433 U.S. at 208 (footnote omitted).

In addition, the same principles of *in rem* jurisdiction that underlie quiet-title actions also form the basis for the State's authority to condemn land for public use and to enforce its property-tax laws. See *Permanent Mission of India*, 551 U.S. at 200-201 (noting that an eminent-domain proceeding "directly implicate[s] rights in

property," and therefore "for an eminent-domain proceeding, [a] foreign sovereign could not claim immunity"); *City of Sherrill*, 544 U.S. at 219-220 & n.13; *County of Yakima*, 502 U.S. at 270. Extending immunity to *in rem* actions involving immovable property would therefore frustrate the exercise of those important state powers, undermining the principle that, notwithstanding tribal immunity, a State should retain the ability "to enforce its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035; see *Duro* v. *Reina*, 495 U.S. 676, 685 (1990) (A State has "the power to enforce laws against all who come within the sovereign's territory."); *Oneida Indian Nation of N.Y.* v. *Madison County*, 605 F.3d 149, 163-164 (2d Cir. 2010) (Cabranes, J., concurring) (allowing States to tax tribally owned fee lands but not to foreclose for nonpayment of those taxes "defies common sense" and leads to "anomalous" results), vacated, 562 U.S. 42 (2011). With 573 federally recognized tribes located in 35 States, the threat to state interests would be substantial. 83 Fed. Reg. 4235 (Jan. 30, 2018); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40.

The acuteness of the problem is illustrated by the facts of this case, where the Lundgrens' and their family's title to the disputed property had vested in them by virtue of adverse possession and mutual acquiescence years before the Tribe acquired any interest in the property. Pet. App. 15a. If the Tribe's subsequent acquisition could defeat state jurisdiction, then any landowners facing potential quiet-title actions, condemnation proceedings, or tax foreclosures could convey their property to a tribe and avoid a judicial resolution. See, *e.g.*, *Oneida Tribe of Indians of Wis.* v. *Village of Hobart*, 542 F.

Supp. 2d 908, 913-914 (E.D. Wis. 2008) (tribe purchased land scheduled to be condemned for a highway and then attempted to invoke sovereign immunity to avoid condemnation and thus block the highway); *Cass Cty. Joint Water Res. Dist.*, 643 N.W.2d at 688 (tribe purchased land projected to be flooded by proposed dam and then attempted to invoke sovereign immunity to avoid condemnation of the land and thus block the dam); cf. *Allergan, Inc.* v. *Teva Pharm. USA, Inc.*, No. 2:15-CV-1455-WCB, 2017 WL 4619790 (E.D. Tex. Oct. 16, 2017) (patentee assigned patent to an Indian tribe, and tribe attempted to invoke sovereign immunity to defeat inter partes review proceedings).

4. Expanding immunity would leave landowners like the Lundgrens without a meaningful remedy

In *Bay Mills*, this Court noted that it has never "specifically addressed * * * whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." 134 S. Ct. at 2036 n.8. Extending immunity to these circumstances would require the Court to confront that question, for as the Washington Supreme Court observed, dismissing this action on the basis of sovereign immunity "would result in no adequate remedy" for the Lundgrens. Pet. App. 17a. In an effort to resist that conclusion, the Tribe argues that "the Lundgrens had and continue to have a means to seek redress for their claim." Pet. Br. 35 (capitalization altered). In fact, the futility of the Tribe's suggested alternatives only under-

scores that the application of immunity in this case would deprive the Lundgrens of a meaningful remedy.

The Tribe argues (Pet. Br. 36) that the Lundgrens should have "confirm[ed] their title" at some point before the Tribe purchased the property adjoining theirs. That argument is both legally and factually flawed. As a legal matter, it overlooks the rule of Washington law that "[t]itle vests automatically in the adverse possessor if all the elements are fulfilled throughout the statutory period." *Gorman* v. *City of Woodinville*, 283 P.3d 1082, 1083 (Wash. 2012); see Pet. App. 15a. A "title obtained through adverse possession is as strong as a title acquired by deed," and the adverse possessor "need not sue to perfect his interest." *Gorman*, 283 P.3d at 1084. As a factual matter, the Lundgrens had no reason to "confirm their title" because they were unaware of any competing claims to the property and had no way to anticipate that an Indian tribe might someday buy the adjoining parcel without first conducting a survey, assert a competing claim to a portion of their property, and then seek to foreclose any remedy by invoking sovereign immunity.

In addition, if the Tribe's theory of immunity were correct, the Lundgrens would not have benefitted from successfully pursuing a quiet-title action before the Tribe purchased the adjoining parcel. Under Washington law, a quiet-title action simply "clarifie[s] what already exists." *Gorman*, 283 P.3d at 1085. If the Tribe is immune from this action, which is based on the Lundgrens' title that vested by operation of state law, the Tribe would logically be immune from an action based on a title established by a state-court judgment.

The Tribe next argues (Pet. Br. 36) that "Washington law recognizes a claim for money had and received and a claim for unjust enrichment, either of which the Lundgrens could bring against the seller of the property who, they claim, sold the property without the right to do so." That argument overlooks that money damages are an inadequate remedy for the loss of land. See *Crafts* v. *Pitts*, 162 P.3d 382, 387 (Wash. 2007). In any event, neither claim is viable. As its name implies, a claim for money had and received "is for the recovery of money actually received and wrongfully withheld from plaintiff." *Coast Trading Co.* v. *Parmac, Inc.*, 587 P.2d 1071, 1076 (Wash. Ct. App. 1978). Here, the Lundgrens paid no money to their neighbors who sold the property to the Tribe, and even if they had, there is no indication that those parties have retained the money. See *ibid.* (denying money-had-and-received remedy where recipient no longer held the disputed sum). A similar problem would doom a claim for unjust enrichment, which requires the plaintiff to have conferred a benefit on the defendant. *Young* v. *Young*, 191 P.3d 1258, 1262 (Wash. 2008). Again, the Lundgrens conferred no benefit on the Tribe's predecessors in interest. An unjust-enrichment claim also requires that the receiving party have knowledge of the benefit, whereas any benefit received by the Tribe's predecessors was received unknowingly. See *Cox* v. *O'Brien*, 206 P.3d 682, 689 (Wash. Ct. App. 2009) (purchaser of damaged home could not assert unjust-enrichment claim against seller who was unaware of damage).

Nor do the Lundgrens have any other realistic options. Of course, if the Tribe were to sue them, the Lundgrens would be able to obtain a determination that

title to the disputed property is vested in them. The United States suggests (Gov't Br. 23-24) that the Lundgrens could "log trees on the disputed strip, commence building a structure there, or take other similar actions" to provoke the Tribe to sue. But in order to establish adverse possession, the Lundgrens had to show that they have *already* engaged in an open and notorious occupancy of the disputed property that is hostile to any competing claim. Pet. App. 14a. As this case demonstrates, the Lundgrens cannot force the Tribe to sue if it is unwilling to do so.

Even if the Tribe were to tear down the fence and physically occupy the disputed property—as it has threatened to do, J.A. 20—the Lundgrens would not necessarily be able to establish their title. The Tribe's sovereign immunity would bar an *in personam* trespass action against the Tribe. While the Lundgrens could sue the tribal employees involved in the trespass, see *Lewis*, 137 S. Ct. at 1288, an individual-capacity judgment against one employee would not bind any other employee, see *Taylor* v. *Sturgell*, 553 U.S. 880, 893-895 (2008). Thus, the Lundgrens might be forced to litigate the same issue repeatedly against different tribal employees. In any event, a tortious physical occupation followed by a series of lawsuits would hardly be an orderly or efficient method of determining the parties' rights.

In the absence of such a method, the Tribe's claim of ownership will remain as a cloud on the Lundgrens' title. See *Robinson* v. *Khan*, 948 P.2d 1347, 1349 (Wash. Ct. App. 1998) ("Anything * * * that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is * * * a cloud upon his title which the law

should recognize and remove.") (quoting *Whitney* v. *City of Port Huron*, 50 N.W. 316, 317-318 (Mich. 1891)). That cloud will impair their ability to sell the property, to obtain financing, or otherwise to obtain full enjoyment of their rights. Thus, despite their ownership of the property—recognized by the trial court to be "as clear * * * a case as I've had on the bench," Pet. App. 5a—the Lundgrens will have no effective remedy for the Tribe's impairment of their rights. The Tribe should not be permitted to achieve that unjust result by "wield[ing] sovereign immunity as a sword." *Id.* at 18a.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted.

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